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ABSTRACT

Concern with school violence and efforts to reduce gang visibility at school have led to controversy about students' constitutional rights to freedom of expression. This document outlines legal precedents and offers guidelines for developing a sound school policy on dress codes. It answers the following questions: (1) Are gang clothing and symbols protected forms of expression? (2) Are gang symbols different from protected, nondisruptive symbols? (3) Are there other grounds for regulating gang symbols? and (4) Are there limits on the degree to which gang symbols can be regulated? Generally speaking, if a board can show that the "message" of gang attire substantially interferes with the learning environment, then restrictions on attire will probably be upheld. A student's right of expression can constitutionally be limited if it interferes with another student's right to learn. By contrast, if a board cannot prove that a gang problem exists, justification for a gang-clothing restriction is considerably weaker. School districts must have a clear and reasonable basis for their policy. A policy that stresses the importance of reducing distractions that inhibit learning is more likely to succeed than a dress code or policy that stresses restricting gang communication via limitations on attire. If the message being conveyed to students is one of intimidation, fear, or threat of violence, dress regulations should be addressed as an attempt to control the learning environment, and not as a freedom-of-expression issue. Although courts often defer to school board expertise, it will be critical that boards carefully draft regulations that balance the individual's freedom of expression with the public interest in quality education. (LMI)

A Legal Memorandum

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Dress Codes and Gang Activity

Introduction

Hair and dress codes have not been a topic of much concern for school principals or their legal advisers since the 1970s, but recent concern with school violence and efforts to reduce gang visibility at school have caused some of the issues raised in the earlier cases to be reviewed again.

Generally, legal objections to dress codes or other rules regulating student appearance have been based on the First Amendment of the U.S. Constitution regarding the right to "free expression," although this term does not appear in the amendment.

Despite this omission, the idea has evolved that the state should not restrict speech or conduct that is intended to express ideas without some important reason for doing so. The basic rules regarding such expression in the educational context were set in the landmark case of *Tinker* v. *Des Moines Independent Community School District* back in 1969.[1] In that case, as almost all administrators know, the wearing of black armbands as a means of protesting the Vietnam War was described by the U.S. Supreme Court as "symbolic speech" and was accorded the same protection as "pure speech." As shaped by the Supreme Court in *Tinker* and earlier non-school cases, the state may regulate the speech of persons within its jurisdiction only if it can satisfy three specific requirements:

1. The regulation must be content-neutral; that is, the governmental entity cannot prefer some ideas over others.[2]
2. The regulation must be narrowly tailored to serve a "significant governmental interest."[3]
3. The regulation must leave open "alternative channels" for communication of information.[4]

In the *Tinker* case, the U.S. Supreme Court found the school district's refusal to allow students to wear their black armbands to be inappropriate so long as the student's action was intended to communicate ideas and did not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[5] In other words, the regulation of student dress and behavior, like that of pure speech itself, would be permissible only if it could reasonably be anticipated to lead to disruption of the educational process or the rights of other students.

Are Gang Clothing and Symbols Protected Forms of Expression?

Before analyzing the degree of protection the *Tinker* decision would afford items of clothing worn as gang identifiers, it is important to first determine whether gang clothing or other marks of identification qualify as a protected form of expression at all.

While the Supreme Court accepted the notion in *Tinker* that the wearing of a black armband could be regarded as "symbolic speech" and therefore due protection under the First Amendment, the law does not necessarily regard all clothing or decorative items in this way. A year before the *Tinker* decision, for example, then Chief Justice Warren said in his majority opinion in a case called *United States* v. *O'Brien*,

> [w]e cannot accept the view that an apparently limitless variety of conduct can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.[6]

In subsequent cases, the Court has reiterated this limitation on expression and has articulated a two-part test to determine whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play. First, there must be intent to convey a particularized message. Second, the likelihood must be great that within the surrounding circumstances the message will be understood by those who view it.[7]

It is clear that intentionally wearing gang clothing conveys a message. If the message is simply, "I am a member of such-and-such gang," then it may be argued that the message is particularized. In the school setting it is likely that fellow gang members recognize the item of clothing as symbolic of their gang affiliation.

1. 393 U.S. 503, 89 S.Ct. 733.
2. *See* Cohen v. California, 403 U.S. 15, 19; 91 S.Ct. 1780, 1785 (1971).
3. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069 (1984).
4. *Id.*
5. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733 (1969).
6. 391 U.S. 367, 376, 88 S.Ct. 1683, 1678 (1968).
7. Spence v. Washington, 418 U.S. 405, 410, 94 S.Ct. 2727, 2730 (1974).

EA 027414

Under this rudimentary analysis, wearing gang clothing meets the initial *O'Brien* two-step test and is sufficiently communicative to bring the First Amendment into consideration. However, it may be argued that wearing gang clothing also conveys a variety of other messages including threat, fear, intimidation, and challenge to rival gangs and that consequently the message is not particularized. It is as likely as not that the wearer's intended message may be misunderstood by those who receive the message. Reports by teachers and students indicate that gang clothing conveys fear, intimidation, and threat. Students are likely to respond to the gang regalia as indicative of potential violence from a gang, rather than to simply identify a particular gang by its wearer's symbolic attire. School officials may argue that the real issue is the message that third parties receive—students who are not involved in gang activity per se but who are affected by the intimidating effect of the gang clothing message. Gang attire will probably meet the first prong of this test (particularized message), but it is debatable whether the second prong (understanding/comprehension) can be met.

If a court were to hold that gang regalia is expressive conduct and is thereby protected by the First Amendment, the next issue would be what level of scrutiny the court should invoke against the regulations. In *United States* v. *O'Brien*, the court spelled out four criteria that a government regulation must meet if it limits expressive conduct:

> [1] [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; [4] and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.[8]

Although the United States Supreme Court has not raised education to the level of a fundamental right, it is valued as one of the most important governmental interests. "Today, education is perhaps the most important function of state and local governments ... It is required in the performance of our most basic public responsibilities. ... It is the very foundation of good citizenship ... it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[9]

Generally, the responsibility for education has been delegated to the states. State laws authorize school boards to take reasonable steps to ensure a positive learning environment for school-age citizens. With the general exception of school segregation cases, courts usually defer to a school board's expertise when cases involve conclusions about school pedagogy. It therefore seems probable that a school board is not overreaching its authority and would thus meet the first prong of the *O'Brien* test when it adopts a dress code for the purpose of maintaining the board's interest in providing safe and secure classrooms to facilitate effective learning. The genuine purpose of a school's dress code becomes the threshold determination as to constitutionality under *O'Brien*. If it can be shown that the purpose of the dress code or clothing restriction is to protect the right to an education or to maintain an effective learning environment, the regulation is likely to pass the second prong of the *O'Brien* test. On the other hand, if the intent of the dress code is to suppress a gang message, it is likely to fail the third phase of the *O'Brien* test. In essence, the second and third *O'Brien* prongs balance a school board's interest in maintaining a safe, orderly environment while protecting other students and their right to an education against a gang's interest (as well as the interests of the individual gang members) in freedom of expression. "The Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word ... it may not, however, proscribe particular conduct because it has expressive elements ... It is ... not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction is valid."[10] Dress codes may be constitutional under the *O'Brien* test if the government's interest in prohibiting gang clothing because of its interference with education outweighs the infringement on speech.

Are Gang Symbols Different From *Tinker* Armbands?

If it can be shown that gang-related clothing causes a disruption or interferes with the rights of other students, it is very likely that its prohibition or reasonable restriction will be upheld. The *Tinker* court specifically noted that the case record did not evidence any facts that might have led authorities to anticipate disruption or interference with school activities. Similarly, the protesting students did not intrude in school affairs or the lives of others. Although the arm-banded students caused some out-of-class discussion, they did not interfere with schoolwork. Consequently, if students wearing gang clothing were to behave as the *Tinker* students did without causing any material disruptions, regulatory gang clothing dress codes would be likely to fail. However, if wearing gang clothing causes violence, fear, or intimidation as has been suggested, then regulation will be upheld. The *Tinker* decision also seems to imply that the school officials' rule may have been upheld if their forecasted fears had been substantiated.[11] Potentially, this point is a major consideration for school districts planning to implement gang-related dress codes, as well as districts with codes already in place. The *Tinker* decision supports dress code limitations on gang regalia where there are provable facts of disruptive behavior rather than just theoretical speculation. In other words, a school board must determine if anticipation of a gang clothing problem is reasonable in light of specific circumstances within the affected school or district.

Are There Other Grounds for Regulating Gang Symbols?

In another more recent landmark school case, *Bethel School District No. 403* v. *Fraser*,[12] the United States Supreme Court again noted a conflict between a student's First Amendment

8. 391 U.S. at 376, 88 S.Ct. at 1678.
9. Brown v. Board of Education of Topeka, 347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed. 873 (1954).
10. Texas v. Johnson, 491 U.S. 397, 406, 109 S.Ct. 2533, 2540 (1989).
11. Tinker at 512–514, 89 S.Ct. at 739–740.

rights and the need for effective public education. Fraser, a high school senior, presented a lewd speech in front of approximately 600 fellow students, in spite of warnings by teachers that his speech was inappropriate. After being suspended from school, he subsequently sought an injunction and monetary relief for an alleged violation of his First Amendment right to freedom of speech. The Supreme Court distinguished the political message of the *Tinker* armbands from Fraser's sexual innuendo. *Tinker* emphasized that the armbands were not disruptive, but *Fraser* noted the role of public education in preparing students for citizenship:

> the undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.[13]

In addition, the Court granted wide deference to school boards to determine "what manner of speech in the classroom or in a school assembly is inappropriate."[14] Gang regalia that is considered lewd, vulgar, or unduly disruptive is squarely addressed by the holding in *Fraser* and could be restricted without repercussion unless an argument arises over the reasonableness of the board's definitions of lewd, vulgar, or unduly disruptive. *Fraser* indicates a judicial trend toward greater deference to school boards to determine what speech "intrudes upon the work of the school or the rights of other students."[15]

Research on the influence of gang activity in public schools is sketchy, but there is evidence to show that gang violence has increased tremendously at the same time as dropout rates have risen and standardized test scores have declined. It would be presumptuous to conclude that one produced the other; however, there is a strong inference that such a correlation exists. According to a study conducted in the Chicago area in 1984 by Rev. Charles Kyle, Jr., gang intimidation was the primary reason for the area's 40 to 60 percent dropout rate.[16] Thirty-eight percent of the males and 42 percent of the female students surveyed reported they were physically harmed by gangs at Clemente and William H. Wells high schools.[17] Eighty percent of the students at the private Christian Academy cite gang intimidation as the reason they dropped out of the public high schools, according to Marla Lucy, assistant principal at Academy.[18] The *Tinker* court might be characterized as having been concerned with interruption in a student's learning for a single day. If the correlation between gang intimidation/activity and dropout rates proves correct, many of our nation's students are facing an interruption or termination of their educational careers with lifelong implications for earning potential, viability in the community, and their roles in contemporary society.

Are There Limits on the Degree to Which Gang Symbols Can Be Regulated?

Opponents of dress codes raise two additional protections of freedom of expression: overbreadth and vagueness. A regulation or rule may be voidable by a court if it can be shown that, as a result of the rule or regulation, people are compelled into not using speech or expression that is otherwise protected. The intent of the rule may be valid, but the rule or regulation itself has a chilling effect and is thus overbroad. A rule is also overbroad if it is vulnerable to selective enforcement. For example, Margaret Russell, an attorney for the American Civil Liberties Union, charged that an Oakland, Calif. dress code was overbroad because it would have a "disproportionate impact on young males of color who often fit so called 'gang profiles' even when they are not gang members."[19] In Cheyenne, Wyo., for example, parents threatened suit when the school proposed a dress policy advising against wearing clothing with professional sports team logos because of its suggested gang affiliation.[20] (All professional team logos were included to prevent a discriminatory effect.) The parents claimed the rule unfairly restricted students who were not involved in gangs from freedom of choice of apparel, a form of freedom of expression.

A regulation that is unduly vague can also be voided by judicial action. The chilling effect of a vague regulation is very similar to overbreadth; however, with a vague regulation a person does not know if his or her speech or conduct will be constitutionally protected and thus he or she refrains from speaking or acting. For example, in the Cheyenne scenario, it may be argued that the restriction on professional sport logos is so vague that a person would not know if it is accepted to wear any team logo or only those with proven gang-affiliation; consequently, the regulation chills behavior and the student wears no clothing that has any sport affiliation. It seems that the key to avoiding overbreadth and vagueness is the careful wording of the regulation or rule. Although some persons may arguably be chilled from wearing clothing that has known gang connections, a court will probably weigh that burden against the legitimate government interest in maintaining an effective learning environment, uninterrupted by gang violence or intimidation.

Gangs can resort to creative ways of avoiding dress codes. If a gang has identified itself by Raiders jackets and a school restriction on wearing Raiders jackets follows, the gang may switch their identifiable clothing to something else, British Knights athletic shoes, for instance. Some gangs have resorted to more permanent markings such as tattoos, scars, and hairstyles. As a result, many schools are adopting policies like that in El Paso, Tex. that states:

> Dress should never distract from school activities or prove a hazard to the student's safety or to the safety of others. The following articles are specifically forbidden:

12. Bethel School District No. 403 v. Fraser, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 [32 Ed.Law Rep. [1253]] (1986).
13. Fraser at 681, 106 S.Ct. at 3163.
14. Fraser at 683, 686, 106 S.Ct. at 3164, 3166.
15. Tinker 393 U.S. at 509, 89 S.Ct. at 738; Fraser 478 U.S. at 680, 106 S.Ct. at 3163.
16. Wes Smith, "Safety-Zone Drive Crowds Gang Turf," *Chicago Tribune*, March 30, 1987, News, p. 7 zone C.
17. *Id.*
18. *Id.* at 18.
19. Pearl, Stewart, "Oakland Pospones Dress Code Vote," *San Francisco Chronicle*, August 29, 1991, at p. A19.
20. Telephone Interview with Lee Beidleman, Assistant Principal, East High School, Cheyenne, Wyo.; February 3, 1992.

A. hats—except in extenuating circumstances, may be worn on campus but not in the building
B. clothing that promotes the use of drugs, alcohol, or tobacco
C. clothing with abusive or suggestive language or symbolism, *or reflecting gang affiliations* ... [emphasis added][21]

Other school districts do not discipline for wearing gang insignia per se, but punish when gang clothing is coupled with intimidating behavior, flashing gang signs, writing graffiti, or disrupting school. According to John Yasutake, the affirmative action manager for the Seattle, Wash. public schools,

> you can't stop them from wearing a certain style of clothing. Clothing is just the tip-off. Behavior is where you zing them. If you wear a Raiders cap, sag your pants, stand in the halls flashing gang signs and intimidate other students, you're out of here. But if you just wear a Raiders cap, go to class and don't bother anybody, that's not a problem."[22]

Conclusion

Violence in the public schools is on a steady rise. The number of identifiable gangs has increased and is no longer confined to the major population centers. Membership in gangs has broadened to include both older and younger members as well as females. Accompanying the growing numbers is a growing fear of gangs. In some communities fear of gangs has become so pervasive that it threatens students' ability and opportunity to learn. In order to resolve the problem, school boards and administrators must first be aware of increasing gang activity. Second, they must substantiate that there is a problem within their jurisdiction. Third, they must take measures to reduce the power of the gangs and to redirect focus on learning through well-written policies. In their zeal to accomplish this difficult goal, school boards and administrators must be aware of the potential interference with an individual's freedom of expression.

Generally speaking, if a board can show that the "message" of gang attire substantially interferes with the learning environment, then restrictions on attire will probably be upheld. In *Olesen v. Board of Education*, for example, a high school senior challenged an Illinois school district's rule forbidding gang activities, including the wearing of gang symbols, jewelry, and emblems. The student specifically objected to the interpretation of the rule that prohibited male students from wearing earrings. Although the student's favorite earring had a cross appended to it that was the symbol chosen by a local gang, the student disavowed any connection with the gang and asserted that the policy violated his right to free expression of his individuality.

The district court reasoned that there was no violation of First Amendment free expression because a message of individuality was not within the protected scope of the Constitution. In addition, the school district had a *clear and reasonable* basis for its policy curtailing gang activities in the school setting. Finally, the student failed to demonstrate that his rights should outweigh the public interest in uninterrupted education.[23]

A student's right of expression can constitutionally be limited if it interferes with another student's right to learn. By contrast, if a board can *not* prove that a gang problem exists, justification for a gang clothing restriction is considerably weaker. School districts must have a clear and reasonable basis for their policy. A policy that stresses the importance of reducing distractions that inhibit learning is more likely to succeed than a dress code or policy that stresses restricting gang communication via limitations on attire. If the message being conveyed to students is one of intimidation, fear, or a threat of violence, dress regulations should be addressed as an attempt to control the learning environment, and not as a freedom of expression issue. If the present trend continues, nearly all school districts will be forced to address the gang problem at some point in the future. Although courts often defer to school board expertise, it will be critical that boards carefully draft regulations that balance the individual's freedom of expression with the public interest in quality education.

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21. Student Handbook, Ysleta Independent School District, El Paso, Tex., p. 50.
22. Paula Bock, "Anti-Gang Guidelines Proposed for Schools," *Seattle Times*, December 5, 1990, p. A1.
23. Olesen v. Board of Education, 676 F. Supp. 820 (N.D. Ill. 1987).

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